No. 31735 - Mt. State Bit Service, Inc., a West Virginia corporation v. State of West Virginia, Department of Tax and Revenue

**FILED**
**March 17, 2005**
**released at 3:00 p.m.**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

Before this Court, the Tax Department argued that a retail seller of blasting materials, Mt. State Bit Service, Inc. (hereinafter referred to "Mountain State Bit"), was not a coal mining company. Therefore, Mountain State Bit was not exempt from a use tax. The majority opinion disagreed with the Tax Department. In doing so, the majority opinion has violated statutory rules of construction to reach a result that has ominous financial consequences for the revenue of this State. Consequently, and for the reasons set out below, I dissent.

This was a simple case. In fact, the circuit court agreed with the Tax Department that, as a retail seller of blasting materials, Mountain State Bit was not a coal mining company merely because it *occasionally* blasted mining walls for coal companies. This simple case has mushroomed into a potential financial nightmare for the State. In essence, the majority opinion has rewritten statutes. Although there were several statutory provisions that the majority opinion erroneously construed to reach its result, I will confine my dissent to the statutory provision that was dispositive.

Pursuant to W. Va. Code § 11-15-9(g), a business engaged in the production of natural resources is exempt from a use tax. In order to determine whether a retail seller of blasting materials, such as Mountain State Bit, was engaged in the production of coal, the majority opinion looked to the definition of "production of natural resources" as it was defined in 1987. The phrase "production of natural resources" was first defined in 1987 under W. Va. Code § 11-15-2(t) as follows:

> "Production of natural resources" means the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith.

The above statute is clear and unambiguous. Under a fundamental rule of statutory construction, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959). Pursuant to W. Va. Code § 11-15-2(t), if Mountain State Bit, as a retail seller of blasting materials, wanted to qualify as a producer of coal, it had show that its coal activity included "exploring, developing, severing, extracting, reducing to possession **and** loading for shipment for sale, profit or commercial use[.]" The Tax Department and the circuit court accepted this as the plain and unambiguous meaning of "production of natural resources." W. Va. Code § 11-15-2 (t) (emphasis added). Thus, both the Tax Department and the circuit court found that the

blasting activities of Mountain State Bit failed to meet that definition.

To frustrate the plain and unambiguous meaning of W. Va. Code § 11-15-2(t), the majority opinion, without acknowledging the fact, found the statute to be ambiguous. The majority opinion did so by concluding that when the Legislature said "exploring, developing, severing, extracting, reducing to possession **and** loading for shipment for sale, profit or commercial use," it meant something different than what it had plainly stated. Consequently, the majority opinion rewrote the statute to say "exploring, developing, severing, extracting, reducing to possession **or** loading for shipment for sale, profit or commercial use." The majority opinion believed that when the Legislature said "and" it was erroneous, and that the Legislature should have said, or meant to say, "or." Armed with its new judicial definition of "production of natural resources", the majority opinion made a retail seller of blasting materials a coal producer. The majority so concluded because Mountain State Bit severed rocks from coal for mining companies. With this analysis, I cannot agree.

The prior decisions of this Court have long warned that "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]" *General Daniel Morgan*, 144 W. Va. at 145, 107 S.E.2d at 358 (citation omitted). Further, it is the "duty of this Court to avoid whenever possible a construction of a statute which leads to

absurd, . . . unjust or unreasonable results." *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990). The majority opinion tossed aside these time-honored principles because the majority did not believe the Legislature meant "and" when it plainly and clearly said "and." Had the majority only taken the time to educate itself on the history of W. Va. Code § 11-15-2(t), my brethren would have understood that when the Legislature said "and," it meant "and," not "or." I am certain of Legislative intent because the Legislature has amended W. Va. Code § 11-15-2(t) on at least *three separate occasions* since its passage in 1987. The first amendment to the statute occurred in 1993 and read:

> "Production of natural resources" means the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession, processing **and** loading for shipment and shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith.

Acts of 1993, c. 156 (emphasis added). The underlined text of the statute indicates the additions made by the Legislature to the statute in 1993. But more importantly, the highlighted word "and" remained in the statute as it existed in 1987.

In 1994, the Legislature again re-visited W. Va. Code § 11-15-2(t). This time the Legislature redesignated the statute as W. Va. Code § 11-15-2(o). The statute was also

expanded upon as follows:

> "Production of natural resources" means, except for oil and gas, the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession *[omitted processing]* and loading for shipment **and** shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith. For the natural resources oil and gas, "production of natural resources" means the performance, by either the owner of the natural resources, a contractor or a subcontractor, of the act or process of exploring, developing, drilling, well-stimulation activities such as logging, perforating or fracturing, well-completion activities such as the installation of the casing, tubing and other machinery and equipment and any reclamation, waste disposal or environmental activities associated therewith, including the installation of the gathering system or other pipeline to transport the oil and gas produced or environmental activities associated therewith and any service work performed on the well or well site after production of the well has initially commenced. All work performed to install or maintain facilities up to the point of sale for severance tax purposes would be included in the "production of natural resources" and subject to the direct use concept. "Production of natural resources" does not include the performance or furnishing of work, or materials or work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property, by persons other than those otherwise directly engaged in the activities specifically set forth in this subsection as "production of natural resources".

Acts of 1994, c. 171 (emphasis added). The underlined text of the statute indicates the 1994 additions made by the Legislature to the statute. The italicized words show what the Legislature deleted from the statute in 1994. The highlighted word "and" remained in the statute as it existed in 1987. Again, the Legislature had an opportunity to fully examine the statute and made the changes it deemed appropriate to carry out its intent.

In 1998, the Legislature once again revisited W. Va. Code § 11-15-2(t), which had been redesignated as W. Va. Code § 11-15-2(o). As a result of the 1998 amendments, the statute read:

> "Production of natural resources" means, except for oil and gas, the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment **and** shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith and the construction, installation or fabrication of ventilation structures, mine shafts, slopes, boreholes, dewatering structures, including associated facilities and apparatus, by the producer or others, including contractors and subcontractors, at a coal mine or coal production facility. For the natural resources oil and gas, "production of natural resources" means the performance, by either the owner of the natural resources, a contractor or a subcontractor, of the act or process of exploring, developing, drilling, well-stimulation activities such as logging, perforating or fracturing, well-completion activities such as the installation of the casing, tubing and other machinery and equipment and any reclamation, waste disposal or environmental activities associated therewith, including the installation of the gathering system or other pipeline to transport the oil and gas produced or environmental activities associated therewith and any service work performed on the well or well site after production of the well has initially commenced. All work performed to install or maintain facilities up to the point of sale for severance tax purposes would be included in the "production of natural resources" and subject to the direct use concept. "Production of natural resources" does not include the performance or furnishing of work, or materials or work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property, by persons other than those otherwise directly engaged in the activities specifically set forth in this subsection as "production of natural resources".

Acts of 1998, c. 303 (emphasis added). The underlined text of the statute indicates the additions made by the Legislature to the statute in 1998. Again, the highlighted word "and" remained in the statute as it existed in 1987.

I have labored to demonstrate that, starting in 1987, the Legislature defined "production of natural resources" on four separate occasions. Each time the Legislature deliberated over the definition of "production of natural resources," it always included the passage "exploring, developing, severing, extracting, reducing to possession **and** loading for shipment for sale, profit or commercial use." Even though the Legislature has had more than fourteen years of experience with the statute at issue in this case, the majority of this Court has determined that the Legislature unknowingly kept the word "and" in the statute. As such, I believe this result to be violative of basic statutory construction. *See Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986) ("This Court does not sit as a superlegislature, commissioned to pass upon the . . . merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions."). I feel compelled to remind the majority that:

> Though the Legislature, in enacting the [statute] may not have realized or foreseen the result of its action . . ., it is presumed to be familiar with "all existing law", constitutional, statutory or common, applicable to the subject matter, and it has, by clear, explicit, and unambiguous language, which must be given its usual and ordinary significance and meaning, expressed its intention to accomplish that result. Its power to do so must be recognized, and its enactment given full force and effect, by the courts. *If its exercise of that power cause an undesirable result, the remedy lies with the Legislature, whose action has produced it, and not with the courts. The question of dealing with the situation in a more satisfactory or desirable manner is a matter of policy which calls for legislative, not judicial, action.*

*Hereford v. Meek*, 132 W. Va. 373, 388, 52 S.E.2d 740, 748 (1949) (citation omitted) (emphasis added).

As a final matter, I wish to note that the majority opinion will undoubtedly have far-reaching financial consequences. Although the facts of this case were limited to allowing a retail seller of blasting materials to be transformed into a coal mining company, the majority ruling extends beyond this one case. In effect, *any* business supplying direct services to coal mining companies that involve exploring, developing, severing, extracting, reducing to possession **or** loading for shipment of coal will be able to take advantage of the majority's decision to rewrite an unambiguous statute in order to escape tax liability and deprive this State of precious tax revenue.[1]

Consequently, I respectfully dissent.

[1]Some examples of companies associated with the coal industry that will most certainly benefit from the majority's use tax exemption include mine ventilation companies, industrial rubber companies and mining car manufacturers.